

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1159

ALUMINUM COMPANY OF AMERICA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 15a), dismissing appellants' suit to set aside a decision of the Interstate Commerce Commission in its Docket No. 34373, *Arkansas Intrastate Freight Rates and Charges*, 326 I.C.C. 19 (J.S. 16a–74a). In this proceeding, the

260-857—67

Commission authorized railroads operating within the State of Arkansas to increase certain intrastate rates and charges pursuant to Section 13(4) of the Interstate Commerce Act, 49 U.S.C. 13(4), in order to bring the rates in parity with rates the Commission had previously approved for traffic moving through Arkansas and other States in interstate commerce.[1] Appellants limit their appeal to the increase as it applies to one individual commodity—fluxing limestone used in the process of manufacturing aluminum moved by the railroads within Arkansas.

After the interstate increases, the Arkansas Commerce Commission denied petitions by sixteen railroads for comparable increases in the rates for railroad service within Arkansas (see J.S. 75a–86a). The principal railroads operating in that State then petitioned the Interstate Commerce Commission to enter upon an investigation pursuant to Section 13(4) of the Interstate Commerce Act, 49 U.S.C. 13(4),[2] to

---

[1] The interstate increases were authorized in *Ex Parte No. 212, Increased Freight Rates, 1958*, 302 I.C.C. 665, 304 I.C.C. 289; and in *Ex Parte No. 223, Increased Freight Rates, 1960*, 311 I.C.C. 373, and various sub-numbers (see J.S. 17a, note 2).

[2] Section 13(4) provides in pertinent part:

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such [intrastate] rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups

determine whether the lower level of Arkansas rates imposed an undue burden on interstate commerce. Evidence was submitted by the railroads, shippers, and shipper organizations; the Arkansas Commerce Commission filed a brief opposing the increases.[2]

The railroads' evidence showed that the 1958 and 1960 interstate increases, which they here sought to apply on intrastate traffic, would not fully compensate for increased costs occurring after 1960. They sought merely to cover a portion of the ten separate wage increases experienced from 1956 to 1960, and the 23 percent increase in costs of materials and supplies, including fuel, from 1952 to 1960 (J.S. 48a–49a). These same railroads reached a low of 3.37 percent rate of return on their investment in 1960, and attained only 4.27 percent in 1962, the most recent year of record (J.S. 49a, Exh. TJH–1).

The Commission found (1) that the railroads operating in Arkansas had incurred increased costs on both interstate and intrastate traffic; (2) that the conditions incident to the intrastate transportation of freight are no more favorable than those incident to the interstate transportation of freight; and (3) that the Arkansas intrastate rates and charges failed to

---

of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden * * *."

[2] The Arkansas Commerce Commission made no appearance in the district court.

provide their fair share of the overall system revenue required by the carriers (J.S. 41a–42a). The Commission took into account the Arkansas full-crew law (requiring an additional switchman in certain instances on trains operating in Arkansas) and the economics of shorter intrastate hauls, both of which tend to make intrastate operations somewhat more costly than interstate service (J.S. 21a, 54a). It also considered evidence relating to individual commodities. It made exhaustive findings regarding fluxing limestone (J.S. 22a–30a),[4] alumina (J.S. 30a–33a) and sand, gravel, and crushed stone (J.S. 33a–37a); and adopted the findings of the hearing examiner relating to soybeans, soybean meal (J.S. 62a–63a), and lumber (J.S. 63a–64a). On the basis of these findings, it concluded that the intrastate rates on these commodities were unduly low, and that the lower intrastate rates imposed an undue and unreasonable burden upon interstate commerce (J.S. 41a). Exercising the power conferred on it by Section 13(4)

[4] The Commission found that the present intrastate rate on fluxing limestone used in the production of alumina is 138 cents per ton, and the railroads seek to increase it to 158 cents (J.S. 23a). The present single-line interstate rates, for the same distances, would be 225 or 239 cents, depending upon the length of haul (J.S. 25a). The fluxing limestone is transported either 136 or 150 miles from a crushing plant to appellants' refining plants. (J.S. 22a). Since the other stone rates which appellants cited for comparison were both depressed on account of competition and concerned different commodities, the Commission held that such other rates did not properly measure the maximum reasonable level of rates on fluxing stone. (J.S. 25a–27a). Consequently, the individual rate on the commodity fluxing limestone, even when viewed separately, discriminated against and imposed an undue burden on interstate commerce.

(*supra*, n. 2, p. 2), it ordered the intrastate charges increased.

Two aluminum companies and a grain corporation[3] sued to set aside the Commission's decision. The district court unanimously sustained the Commission. It held that the Commission's findings were supported by substantial evidence, and that no higher standard was required in proceedings under Section 13(4); that in this general system-wide revenue proceeding the Commission was not required to consider the reasonableness or comparability of rates on individual commodities; and that, to the extent that it nevertheless considered specific rates relating to fluxing limestone, its weighing of comparability and cost data were matters peculiarly within the competence of the Commission (J.S. 3a–15a). *Arkansas Grain Corp.* v. *United States*, 263 F. Supp. 480.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

1. Appellants' sole attack is upon the findings concerning one commodity among the numerous commodities moving in intrastate commerce in Arkansas—fluxing limestone used in aluminum production. But in this general revenue proceeding under Section 13(4) the Commission was not required to consider the characteristics of individual commodities, for "[i]t is plain from the nature of the inquiry that the

[3] The Aluminum Company of America, Reynolds Metals Co., and the Arkansas Grain Corp. Only the aluminum companies have appealed.

rate level * * * was found reasonable on the basis of the traffic as a whole" (*Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 483); and it was "not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case" (*King* v. *United States*, 344 U.S. 254, 275).[6] That portion of the Commission's decision which approves the increases sought by the railroads system-wide throughout Arkansas, without relation to their effect on individual commodities, is sufficient to support its decision.

2. Even if the findings related specifically to fluxing limestone are considered, the decision is amply supported. Appellants base their challenge upon comparisons with two other rates, both of which the Commission rejected as inapplicable. First, appellants rely upon the "interstate rate * * * applicable on fluxing stone in the same general territory" (J.S. 4), asserting that the intrastate rate has been raised to a level above the interstate rate. But they are mistakenly attempting to equate the rate on intrastate shipments of fluxing limestone used in manufacturing aluminum with interstate shipments of crushed limestone used in the alkali industry (J.S. 6, note 4). The Commission specifically found this comparison to be

---

[6] Indeed, Congress codified this principle in the 1958 amendment to Section 13(4), 72 Stat. 570, which in effect specified that the Commission need consider only whether intrastate rates unduly burden interstate commerce (72 Stat. 570). See S. Rep. 1647 on S. 3778, 85th Cong., 2d Sess., pp. 20–21 (1958); H. Rep. 2274, 85th Cong., 2d Sess., p. 11 (1958); 104 Cong. Rec. 15528 (remarks of Senator Smathers); and see *Oklahoma Corporation Commission* v. *United States*, 235 F. Supp. 803, 807–808 (W.D. Okla.).

inapposite because the interstate rate for the alkali industry applied only to a type of crushed limestone which was not shown to be interchangeable or competitive with fluxing limestone, and which was differentiated in the tariffs of the railroads (J.S. 27a).[7] Second, appellants seek to analogize to the lower rates which are maintained on fluxing stone for the iron and steel industry in the neighboring State of Texas (J.S. 9). But the Commission noted that the Texas rates applied primarily on sand, gravel, and other aggregates which, unlike the present case, could not bear higher increases due to market competition; further increases there would engender a traffic loss to the railroads (J.S. 25a–26a). Thus, the Commission concluded on the present record that the individual rate on fluxing limestone, even when viewed separately from all other intrastate rates, discriminates against and unduly burdens interstate commerce and must be modified accordingly.

[7] Appellants urged before the hearing examiner that the two commodities *differed*, and the railroads urged they were *the same* (J.S. 23a). The parties thereafter switched their positions on this factual question.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
RICHARD A. WEGMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
LEONARD S. GOODMAN,
Assistant General Counsel,
Interstate Commerce Commission.

APRIL 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

